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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1941

No. ~~1137~~ 1237

THE CONCORD COMPANY, A CORPORATION,

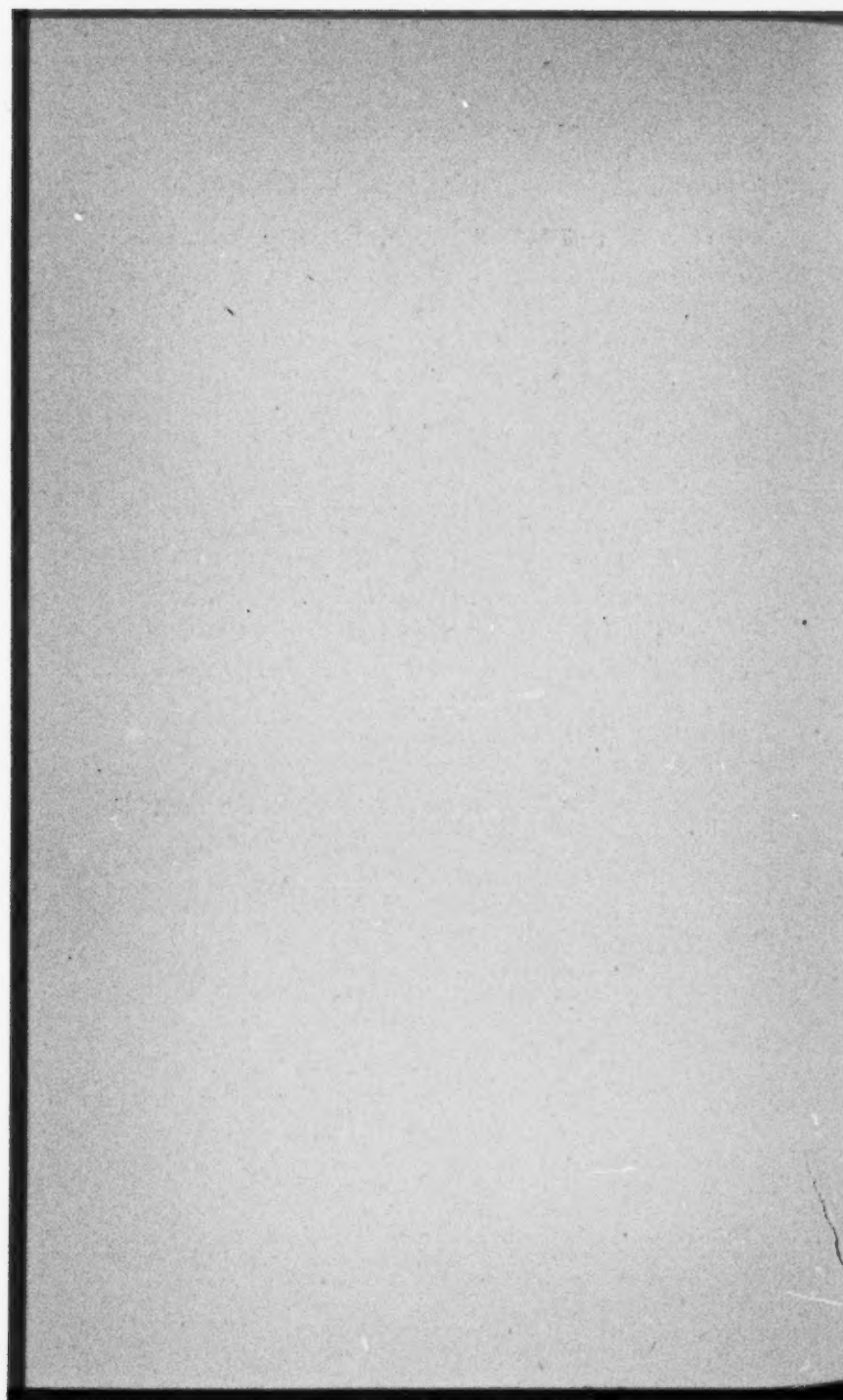
*Petitioner (Plaintiff-Appellant),*

vs.

WALTER R. WILLCUTS, RUTH WILLCUTS AND CECIL H.  
DEIGHTON, AS EXECUTORS OF THE WILL AND ESTATE OF L.  
M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE OF THE  
UNITED STATES, *Respondents (Defendants-Appellees).*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS, EIGHTH CIR-  
CUIT, AND BRIEF IN SUPPORT THEREOF.**

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT.**

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The Concord Company, a corporation, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered February 9, 1942, in the above case affirming a judgment of the United States District Court for the District of Minnesota, dismissing plaintiff's action, and accompanies this petition by certified transcript of the record and proceedings in the court below and by its brief supporting this petition.

## SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is an action by petitioner, The Concord Company, a Delaware corporation, against L. M. Willcuts, Collector of Internal Revenue, after whose death Walter R. Willcuts and others, as executors of decedent's will and estate, were substituted as parties defendant, to recover \$29,042.34, the amount of a deficiency income tax assessment for the taxable year ending February 28, 1930, paid by petitioner under protest.

In 1929, petitioner was the owner of 30,000 shares of the common stock of Cream of Wheat Company, which it received through non-taxable exchange of 20 shares of its own stock for 20 shares of Cream of Wheat stock in 1922, the total 400 shares of stock originally issued by Cream of Wheat having been split up in 1929, through non-taxable transactions at the ratio of 1,500 new shares for each original share. 13,110 shares of the resulting 30,000 shares were sold by plaintiff during its taxable year ending February 28, 1930, for \$484,545.10, and petitioner, in putting its gain from the sale in its income tax return for the taxable year, put the March 1, 1913, fair market value of the stock sold at \$345,000.00, and returned the difference of \$139,545.10 as an item of taxable gain for gross income.

The Commissioner of Internal Revenue determined the March 1, 1913, fair market value of the stock sold to be \$136,663.27, thereby resulting in a gain from the sale of \$347,881.82, and in a deficiency in tax, the amount of which is involved in this proceeding.

The matter was tried to the Court and jury on a stipulation of facts and on extensive oral and documentary evidence adduced at the trial.

The only issue between the parties in this litigation is,



what was the March 1, 1913, fair market value per share of the Cream of Wheat stock involved in this suit? When that figure is determined, the amount of a judgment, if any, in favor of plaintiff and against the defendants, can be computed by the Court and counsel.

It was manifestly impossible to submit any form of general verdict to the jury because such a procedure would require the jury to re-compute the taxpayer's liability under the income tax statutes as they existed in 1930.

Accordingly, as permitted and contemplated by the "Special Verdict" rule, Rule 49 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A., following Sec. 723c) "by agreement between the parties, the only fact issue to be submitted and determined by the jury was as to the March 1, 1913, fair market value per share of the Cream of Wheat stock and the parties agreed that as to all other fact issues, the Court should make its findings of fact; \* \* \*" (Par. 9 of Findings of Fact (R. 770)).

A controversy arose between plaintiff's and defendants' counsel over the form of that special verdict. It was and is petitioner's contention in accordance with the agreement found in the findings of fact by the Trial Court above quoted (R. 770), that there should have been submitted to the jury only one interrogatory:

"What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?"

Defendants' counsel insisted on the submission of another question to be answered first, and the Court, over petitioner's specific objection (R. 742-743), and in conformity with defendants' counsel's request, submitted two questions in the following order, and in the following form:

"1. Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair mar-

ket value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner? (.....)

"Note: If your answer to the above question is 'No,' then the following question may be disregarded:

"2. What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question? (\$.....)" (R. 761).

In connection with the submission of question No. 1, and obviously only because question No. 1 was submitted, the Court charged the jury in part:

"That is your first question. Now you will answer that question either 'Yes' or 'No,' and you will find a place in the verdict which states, or wherein you will either answer that 'Yes' or 'No.' If you answer it 'No' then that will end the case, and you need not spend any time in determining the exact value of the Cream of Wheat stock, because if the plaintiff has not sustained the burden of proof, that the Commissioner erred, then that ends the case.

\* \* \* \* \*

"Now I wonder if I have made that clear. If you answer this first question 'No'—and you will observe that we have written here a note which says, 'If your answer to the above question is "No" then the following question may be disregarded.' You would not pay any attention to the next question. You would have that verdict then signed by your foreman, dated, and returned to the Court. If your answer is 'Yes' then you will have to determine in light of all this testimony and in light of these instructions that I have given you, what was the fair market value of this stock as of March 1, 1913?" (R. 756-757).

The jury, after having listened to two weeks of complicated testimony involving figures beyond the comprehension of the ordinary individual, took the obviously easy way out, and promptly answered the first question "No." *It thereby avoided a determination of the one and only issue as agreed*

*on by the parties and as found by the Trial Court and on which the entire litigation turned, i. e., what was the March 1, 1913, fair market value of the stock in question?*

The basic method of defendants' witnesses in determining the fair market value of Cream of Wheat stock was to compare Cream of Wheat Company, whose stock was closely held, with other companies whose stock was listed on an exchange or sold over the counter extensively on or about March 1, 1913. They were unable to express an opinion as to the fair market value of Cream of Wheat stock unless they could compare it with some stock whose price was quoted, and if they had not gone through this mental process of comparing Cream of Wheat Company with other specific companies, they would have been unable to arrive at any opinion of the fair market value of the Cream of Wheat stock (R. 497).

In connection with their opinions they introduced in evidence, over petitioner's repeated objections, numerous graphs and charts which were based on such comparisons (R. 367, 385, 393, 580, 601, 633), and an examination of the companies and of the charts makes it apparent that the properties compared were not of like character and quality, and were not similarly situated or affected by the same causes in so far as Cream of Wheat stock was concerned. There was no substantial similarity in conditions between the companies as to make the opinions or the graphs and charts of any probative value, and their admission in evidence resulted only in a highly prejudicial disproportionate confusion of issues.

Furthermore, one of petitioner's witnesses, F. W. Clifford, over petitioner's repeated objections, was cross examined by defendants' counsel at length on solely collateral matters (R. 523-529). Counsel's inquiry into the witness' personal and family affairs was not for purposes of impeach-

ment or to affect his credibility, and was not for the purpose of laying a foundation for the admission of any evidence otherwise admissible. The cross examination was highly inflammatory and prejudicial.

Subsequent to the jury's special verdict (R. 761), the Trial Court made its findings of fact, conclusions of law and order directing entry of judgment on the special verdict (R. 762-771), and judgment dismissing the action was accordingly entered on July 29, 1940 (R. 772).

The Circuit Court of Appeals—substantially without discussion, and in effect ignoring and emasculating special verdict practice as contemplated by this Court's adoption of Rule 49 (a); in finding an excuse for the prejudicial cross examination, which excuse is contrary to the facts set forth in the record; in refusing to recognize the very basis of the defendants' experts' opinions, charts and graphs, and in ignoring the tests laid down by this Court as to the admissibility of opinions based on such comparisons—on February 9, 1942, in its opinion reported in 125 F. (2d) 584, affirmed the District Court judgment.

### STATEMENT AS TO JURISDICTION

Jurisdiction is conferred upon this Court by Sec. 240 (a), Judicial Code, as amended by Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a), authorizing the issuance of a writ of certiorari to a Circuit Court of Appeals in any case pending therein.

The judgment of the Circuit Court of Appeals was entered February 9, 1942 (R. 886), and the opinion is reported in 125 F. (2d) 584. A petition for re-hearing was denied, without opinion, March 7, 1942 (R. 907).

## THE QUESTIONS PRESENTED

1. Was the submission to the jury of the first interrogatory, with directory note:

"Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?"

"Note: If your answer to the above question is 'No' then the following question may be disregarded:"

over petitioner's timely and specific objection, and the Trial Court's refusal to submit to the jury only the single interrogatory, reading:

"What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?"

violative of Rule 49 (a) of the Federal Rules of Civil Procedure?

2. Did the submission of the first question call for a conclusion of law or of mixed law and fact, rather than of an ultimate fact, thereby violating Rule 49 (a)?

3. Is the submission to the jury of the question, in substance, of whether the plaintiff has a right to recover anything from the defendant, proper special verdict practice under Rule 49 (a)?

4. Did the submission of the first question refer merely to an evidentiary fact, *i. e.*, the value of the entire 400 shares of stock, and thereby violate Rule 49 (a)?

5. Was the Trial Court's general charge to the jury and the Trial Court's advising the jury as to the effect of their answer to question No. 1 on the outcome of the suit, violative of the special verdict practice contemplated by Rule 49 (a)?

6. What is the proper special verdict practice in the Federal Courts under Rule 49 (a)?

7. Did the submission of the first question give probative effect and the attribute of evidence and a presumption of correctness to the Commissioner's determination, which had passed out of the case, contrary to the decisions of this Court and of the Circuit Courts of Appeal of numerous circuits?

8. Was certain cross examination of plaintiff's witness, F. W. Clifford, on solely collateral matters and inquiring only into his personal and family affairs, and not for purposes of impeachment or to affect his credibility, inflammatory and prejudicial?

9. Were the opinions of defendants' experts, based solely on attempted comparisons between the unlisted closely held stock of Cream of Wheat Company and listed securities of hundreds of other companies, of sufficient probative value to be admitted in evidence, and thereby made the basis of the levying and collecting of taxes?

10. Were the companies relied on by defendants' witnesses, as compared with Cream of Wheat Company, of like character and quality and similarly situated and affected by the same causes, as required by the rules established by this Court?

11. Were the numerous graphs and charts, received in evidence over petitioner's repeated objections, based on comparisons permitted by the decisions of this and other Courts, or were they too speculative to be of any probative value, thereby resulting only in prejudicial confusion?

## **REASONS RELIED ON FOR ALLOWANCE OF THE WRIT**

The decision of the Circuit Court of Appeals decided an important question of Federal law—special verdict practice under Rule 49 (a)—which has not been, but should be, settled by this Court.

The decision of the Circuit Court of Appeals has decided the important question of proper special verdict practice under Rule 49 (a), substantially without discussion, in conflict with the provisions of Rule 49 (a), in conflict with the authorities and Court decisions on which Rule 49 (a) is based, and in conflict with its purpose and intent as shown by its adoption by this Court and by the official annotations to Rule 49 (a).

The decision of the Circuit Court of Appeals as to various phases of proper special verdict practice is in conflict with the decisions of other Circuit Courts of Appeal on the same matters.

There should be an authoritative construction of Rule 49 (a).

The decision of the Circuit Court of Appeals as to the admissibility of defendants' experts' opinions, charts and graphs is in conflict with the applicable decisions of this Court.

The decision of the Circuit Court of Appeals gives probative effect and the attribute of evidence and a presumption of correctness to the Commissioner's determination, which had passed out of the case, in conflict with the decisions of this Court and of the Circuit Courts of Appeal of other circuits.

The decision of the Circuit Court of Appeals in approving the submission of the special verdict in the form in which it was submitted, and in approving the Trial Court's charge

to the jury in connection therewith, and in permitting immaterial and highly prejudicial cross examination of one of petitioner's witnesses, so far sanctioned a departure by the lower court from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.



